United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18, 940

Willie L. Short, Jr., Appellant,

v.

United States of America, Appellee.

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APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

Appellant is being imprisoned for more than three to five years on a conviction of attempted robbery, even though the maximum imprisonment permitted by statute is only one to three years.

Appellant was imprisoned for two years and ten days between his arrest and the imposition of sentence below. That period was required for appellant first to pursue and preserve his rights at trial and then to seek and to achieve reversal of the resulting invalid conviction.

Appellant was imprisoned throughout this period solely because he is a pauper. At any time during his presentence imprisonment the possession of $300 would have enabled him to secure his release.

These facts notwithstanding, the Court below sentenced appellant to be imprisoned for one to three years in addition to the more than two years for which he had already been imprisoned.

Thus, this appeal presents the following questions:

1. Whether the District Court may require an accused convicted of attempted robbery -- for which the maximum imprisonment permitted by statute is one to three years -- to be imprisoned for over three to five years?

2. Whether imprisonment for over three to five years of an accused convicted of attempted robbery -- for which the maximum imprisonment permitted by statute is one to three years -- punishes the accused more than once in violation of the double jeopardy clause of the Fifth Amendment?

3. Whether imprisonment for over three to five years is so disproportionate to the offense of attempted robbery -- for which the maximum imprisonment permitted by statute is one to three years -- that it constitutes a cruel and unusual punishment in violation of the Eighth Amendment?

4. Whether the due process clause of the Fifth Amendment permits a pauper convicted of attempted robbery to be imprisoned for over three to five years, even though a person convicted of the same crime who is not a pauper could be imprisoned for no more than one to three years?

5. Whether the District Court abused its discretion in refusing to credit a pauper convicted of attempted robbery with the imprisonment of more than two years that he suffered solely because of his inability to afford bail between his arrest and sentencing, and thereby requiring the pauper to be imprisoned for over three to five years in circumstances where one not a pauper could not be imprisoned for more than one to three years?

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,940

Willie L. Short, Jr., Appellant,

v.

United States of America, Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COMUMBIA

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TABLE OF CITATIONS

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Miscellaneous

JURISDICTIONAL STATEMENT

Appellant was convicted on his plea of guilty to an information charging attempted robbery, D.C. Code § 22-2902. On September 25, 1964, the District Court sentenced appellant to one (1) to three (3) years imprisonment. On September 25, appellant moved for leave to appeal in forma pauperis. Leave was granted that same day. A notice of appeal was filed on September 28. The jurisdiction of this Court is founded upon 28 U.S.C. § 1291.

STATEMENT OF THE CASE[1/]

On August 10, 1962, a Judge of the Municipal Court of the District of Columbia issued a warrant for appellant's arrest. (J.A. No. 17,688, pp. 4-5.) The charge was attempted robbery. (Ibid.) On September 15, 1962, a District of Columbia police officer arrested appellant on that warrant. (Ibid.; Slip opinion, pp. 3, 6 n. 3.)

Appellant is a pauper. At any time from his arrest to his sentencing below the possession of $300 would have enabled him to pay a bondsman the premium necessary to

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1/ The facts material to this appeal were neither disputed nor the subject of a hearing below. All material facts are set out in either this Court's decision or the joint appendices in Jones v. United States, D.C. Cir. Nos. 17,688-92, decided July 16, 1964, or in Letter from Harris Weinstein to The Honorable Henry A. Schweinhaut, September 24, 1964, which was made part of the record below and is included in the record on appeal. This Court's opinion in the former case is cited herein as "Slip opinion." The joint appendices in the prior case are cited by "J.A." and the first docket number appearing on the appendix cited. The letter to Judge Schweinhaut is cited as "Letter."

secure his release. (Letter, p. 10.) Because he has never had that sum, he has never been able to post bond. He has therefore been imprisoned ever since his arrest. (Id. at pp. 1-2.)

Shortly after that arrest, appellant was indicted on two counts of assault with intent to commit robbery. (J.A. No. 17,688, p. 1.) A jury convicted him, and on February 15, 1963, the Court below sentenced him to a term of four to twelve years imprisonment to run concurrently with a like term imposed upon a separate conviction on a charge of robbery.[2/] (Id. at pp. 2-3; J.A. No. 17,690, p. 8.)

Appellant promptly appealed. That appeal was argued on July 12, 1963, and reargued en banc on April 29, 1964.

On July 16, 1964, this Court ruled that appellant's conviction should be reversed. The case was remanded for further proceedings. This Court's mandate was presented below on August 20, 1964. (See Letter, p. 11.)

On September 17, 1964, appellant waived prosecution by indictment[3/] and consented to the filing of an information accusing him of the attempted robbery charged in the warrant of August 10, 1962. (See Transcript

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2/ The robbery conviction was reversed by this Court. Short v. United States, D.C. Cir. No. 17,691, July 16, 1964. The indictment forming the basis for that conviction was dismissed upon motion of the government on September 25, 1964.

3/ Appellant also waived the further proceedings granted him by this Court's July 16 opinion.

of Proceedings, Sept. 17, 1964.) That same day he pleaded guilty to the information. The facts alleged in that information are essentially those on which his original conviction of assault with intent to commit robbery was based. (See J.A. No. 17,688, at p. 1.)

On September 25, 1964, appellant appeared for sentencing.

He had been in prison continuously for the preceding two years and ten days. Throughout that period he had been a model prisoner. His only infraction of the prison rules had been a single occurrence of oversleeping. (Letter, p. 4.) For this offense he had received a warning. (Ibid.) At no time during his imprisonment had he been deprived of any of the good conduct credits provided by statute. On the contrary, he had been given an extra thirty days' good conduct credit as a reward for his heroic action in saving a fellow inmate from serious injury and stopping the spread of a fire. (Id. at p. 2.)

At the time of sentencing appellant's court-appointed attorney argued that the District Court was without power to sentence appellant to a prison term that would place him in a worse position than had he been sentenced, on the day his imprisonment in fact began, to the maximum statutory term of one to three years.

The Court below rejected appellant's legal arguments. It then sentenced appellant to a term of imprisonment of one to three years in addition to the two years and ten days that appellant had already served.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment:

> "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . nor be deprived of . . . liberty . . . without due process of law . . . ."

Eighth Amendment:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. . . ."

18 U.S.C. § 3568

> "The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: Provided, That the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence.
>
> "If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

"No sentence shall prescribe any other method of computing the term."

18 U.S.C. § 4161:

"Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows:

* * * *

"Seven days for each month, if the sentence is not less than three years and less than five years."

District of Columbia Code
Section 22-2902:

"Whoever attempts to commit robbery . . . by an overt act, shall be imprisoned for not more than three years or be fined not more than five hundred dollars, or both."

District of Columbia Code
Section 24-203:

"(a) . . . in imposing sentence on a person convicted in the District of Columbia of a felony, the justice or

> judge of the court imposing such sentence shall sentence the person for a maximum period not exceeding the maximum fixed by law, and for a minimum period not exceeding one-third of the maximum sentence imposed. . . ."

STATEMENT OF POINTS[4/]

Between arrest and sentencing appellant was imprisoned for more than two years. Upon pleading guilty to attempted robbery, appellant was sentenced to serve one to three years additional imprisonment, even though statutes place a limit of one to three years on the imprisonment of persons convicted of attempted robbery in the District of Columbia. The statutory limits are absolute and should not be exceeded by the sentencing court. The imprisonment imposed upon appellant moreover punishes him twice in violation of the double jeopardy clause of the Fifth Amendment. It is so excessive as to constitute cruel and unusual punishment. Because only his poverty has permitted appellant's imprisonment for three to five years for the crime of attempted robbery,

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4/ There was no evidentiary transcript below. See p. 1 n. 1 of this Brief. The facts material to this appeal are set forth on pp. 2-3, and 6 n. 3 of this Court's opinion in Jones v. United States, supra, and on pp. 1-2, 4, and 10 of the Letter from Harris Weinstein to The Honorable Henry A. Schweinhaut, supra.

the sentence imposed below equally violates the due process clause of the Fifth Amendment. And even were this sentence consistent with statutory and constitutional requirements, it constitutes an abuse of discretion and is contrary both to the intention of Congress that sentencing courts should give credit for presentencing imprisonment wherever possible and to a recent decision of this Court.

SUMMARY OF ARGUMENT

I

The statutes set an absolute limit of one to three years on the imprisonment that may be imposed as punishment for the crime of attempted robbery. The Supreme Court and this Court have both emphasized that a sentencing court may not impose a punishment greater than the maximum established by the legislature. In sentencing appellant to one to three years imprisonment in addition to the two years and ten days that he was in prison before sentencing, the District Court attempted to do indirectly what Congress has forbidden it to do directly. For these reasons, the sentence imposed below is unlawful.

II

The double jeopardy clause of the Fifth Amendment forbids double punishment as well as double trials for the same offense. Any punishment in excess of the maximum ordained by Congress is such unconstitutional double punishment. Because the sentence imposed below requires that appellant be imprisoned longer than the maximum period allowed by statute, that sentence violates the double jeopardy clause.

III

Appellant's minimum imprisonment has been set at three times the minimum established by statute. His maximum exceeds the statutory maximum by two-thirds. Even with maximum credit for good conduct, appellant will be imprisoned for nearly twice the period to which a three year term of imprisonment would be reduced by equivalent credits. In these circumstances the imprisonment imposed below is so excessive as to constitute a cruel and unusual punishment. Indeed, because the sole cause of this excessive imprisonment is appellant's poverty -- a condition over which he has no control -- even one day's imprisonment over the maximum established by statute would be cruel and unusual.

IV

United States constitutional tradition is marked by a search to give the poor justice equal to that which may be obtained by the rich. In a criminal prosecution, an indigent accused is therefore given every procedural advantage that a man of means may secure. Due process must equally require that poverty be a neutral factor in determining the length of imprisonment of an accused convicted of a crime. Because appellant's imprisonment could not have been set at over two years beyond the statutory maximum were he not a pauper, the sentence imposed below deprives appellant of his liberty without due process of law.

V

Assuming arguendo that the sentence imposed upon appellant is lawful and constitutional, the Court below has the discretionary power to credit appellant with his presentencing imprisonment. This Court has the power to examine for an abuse of discretion the refusal to grant such credit below. Because there is neither legal nor practical limit on the period for which an impoverished

accused may be imprisoned while awaiting trial and appellate review of any resulting conviction, and because of the intimate effect that the refusal of the Court below to give credit for such imprisonment has upon the quality of justice that may be administered here, this Court should be particularly willing to exercise its power of review in this case. No justification was given for the action below, which requires appellant to be imprisoned for more than three to five years upon conviction for attempted robbery. It is indeed questionable whether any justification would suffice where the imprisonment imposed could not have exceeded the statutory limits but for the accused's poverty. Moreover, the refusal below to credit appellant with his presentencing imprisonment is contrary both to the intention of Congress that such credits be given whenever possible and to a recent decision of this Court. That refusal must be deemed an abuse of discretion.

ARGUMENT

I. THE DISTRICT COURT HAS ERRONEOUSLY REQUIRED APPELLANT TO SERVE A GREATER IMPRISONMENT THAN THE MAXIMUM PERMITTED BY STATUTE

Section 22-2902 of the District of Columbia Code provides: "Whoever attempts to commit robbery . . . shall be imprisoned for not more than three years . . . ."

The language of Section 22-2902 is clear. It is completely without ambiguity. Its purpose is without doubt. That purpose is to set an absolute limit on the maximum imprisonment of anyone convicted of attempted robbery. That maximum is "not more than three years . . . ."

Section 24-203 of the District of Columbia Code sets an upper limit on the minimum prison term that may be imposed. That statute requires -- with exceptions not here relevant -- that every sentence imposed on a man convicted of a felony in the District of Columbia shall include "a minimum period not exceeding one-third of the maximum sentence imposed . . . ."

Section 24-203 is also clear and unambiguous. It commands that no person convicted of attempted robbery receive a minimum sentence greater than one year.

Moreover, Congress has entitled a convict imprisoned for one to three years to earn good conduct

credits that would make mandatory his release after 27 1/2 months confinement.[5/]

Notwithstanding these clear statutory provisions, the District Court has imposed a sentence that requires appellant to serve a minimum of three years and ten days in prison and makes possible appellant's imprisonment for five years and ten days.

The District Court thus interpreted Section 22-2902 as though it limited imprisonment for attempted robbery to "not more than three years from the date of sentencing." But the statute contains no such provision and reflects no such purpose.[6/]

And, as a practical matter, the only reason appellant has been placed in his present predicament is

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5/ Good conduct credit is granted by either D.C. Code § 24-405 or 18 U.S.C. § 4161, depending upon the place of imprisonment. See Clokey v. U.S. Parole Board, 310 F.2d 86 (4th Cir. 1962). Appellant having been confined in Lorton Reformatory, 18 U.S.C. § 4161 applies. Under that section a person sentenced to a term of one to three years is entitled to a credit of 7 days for each month in the maximum sentence of 36 months, or 252 days. See H.R. Rep. No. 935, 86th Cong., 1st Sess. (1959). Thus, with maximum good conduct credits, a maximum sentence of 36 months becomes 1 year 113 days in confinement, 18 U.S.C. § 4163, and 72 days under supervision "as . . . on parole," 18 U.S.C. § 4164.

6/ Nothing in 18 U.S.C. § 3568 permits a different result. See Subpart C of Part V of this Brief.

that he is so poor that he has never been able to post bond. Thus the statute has been applied as though it limited prison sentences for attempted robbery to "not more than three years unless the defendant is unable to post bond between arrest and sentencing." But the statute is not drafted in this way either, nor does it reflect such a purpose.

Thus there is no basis in the statutory language or purpose for the action of the Court below. Any justification for the sentence imposed below requires that an unwarranted gloss be placed upon the statutory language. The Supreme Court has unequivocally ruled that to infer such a gloss is beyond the power of a sentencing court:

> "We . . . are of opinion that in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms." In re Bonner, 151 U.S. 242, 256 (1894). (Emphasis supplied.)

Not only did the Court below pass beyond the limits of the law authorizing it to render judgment; it

acted contrary to a clearly stated admonition of this Court. Although the precise question raised by the sentence imposed below has never been presented or decided here, this Court has foreseen in three opinions the possibility that the question would arise. These opinions indicate that when this question did arise, the answer would be that the District Court may not extend in any manner the maximum imprisonment set by Congress.

The first case is De Benque v. United States, 66 U.S. App. D.C. 36, 85 F.2d 202, cert. denied, 298 U.S. 681 (1936). The defendant was first sentenced to an indeterminate term of two to four years. After twenty-five months were served, the District Court set aside the sentence as beyond its statutory power. A new sentence of fifteen months was imposed. On appeal the defendant argued that the trial court had been without power to resentence her, and, alternatively, that the new sentence should have been imposed to commence to run as of the date of the original sentence. Both arguments were rejected.

But the case was not put to rest so simply. First, this Court noted that the maximum imprisonment for the

offense in question was ten years. Id. at 39 n. 3, 85 F.2d at 205. And this Court considered whether the second sentence improperly increased the defendant's punishment:

> "Even if it be conceded - we do not decide the point - that the defendant at the time of imposition of the second sentences was entitled to have taken into consideration the fact that she had already served twenty-five months under the first, the void, sentences, still such twenty-five months plus the fifteen months of the second sentences total only forty months as compared with the maximum of forty-eight months under the first sentences." Id. at 42, 85 F.2d at 208.

The question expressly reserved in De Benque was considered, and decided adversely to the defendant, in King v. United States, 69 U.S. App. D.C. 10, 98 F.2d 291 (1938). But, King makes plain that, even though there is no absolute right "to have taken into consideration" a period of imprisonment previous to sentencing, the sentencing court must consider that period at least to the extent of not imposing upon the convict a total period of imprisonment in excess of the maximum punishment allowed by statute.

King was first sentenced to one to two years imprisonment.[7/] After nine months, the sentence was declared void because it had not included the words "at hard labor." King was resentenced to a new term of three to fifteen months in addition to the nine months theretofore served.

In this Court King asserted that, because of a loss of credit for good behavior, his punishment had been increased and the second sentence was therefore invalid. While this Court agreed that the punishment had been increased, it nevertheless found the second sentence lawful:

> "We think the law remains . . . that when a void, or merely voidable, sentence has been vacated as a result of the prisoner's own demands, he cannot complain if his second sentence increases his punishment." Id. at 14, 98 F.2d at 295.

But this Court then proceeded to point out:

> "This is by no means to say that punishment inflicted under a void sentence may be ignored in determining whether a resentence subjects the

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7/ King was convicted under the Liquor Taxing Act of 1934, § 207, 48 Stat. 317 (1934), 26 U.S.C. § 1152g (1934). See also 26 U.S.C. § 5604 (1958). The maximum permissible prison sentence was five years at hard labor. 48 Stat. 317.

> prisoner to more punishment than the legal maximum for his offense. Cf. Jackson v. Commonwealth, 187 Ky. 760, 220 S.W. 1045, 9 A.L.R. 955 [1920]." Id. at 14 n. 3, 98 F.2d at 295 n. 3.

The citation of Jackson v. Commonwealth is particularly instructive. The defendants there had been sentenced by the jury to "eighteen months in the penitentiary." 220 S.W. at 1045. The trial judge, who was required to follow the jury direction, erroneously sentenced the defendants to the House of Reform. Ten days later the Court vacated the first sentence, and pronounced a new one of eighteen months in the penitentiary.

As did this Court in De Benque, the Kentucky Court of Appeals in Jackson rejected the argument that the error in the first sentence prohibited the passing of a second and proper sentence. But, on its own motion, the Court stated:

> "The only substantial error the trial court made at the special term, in entering the judgment sentencing appellants to the penitentiary, was in failing to allow them credit for the time served in the House of Reform. It would be an injustice, as well as flagrant invasion of their legal rights, to require them to serve their terms, or any part thereof, twice. Since they served 10 days in the House of Reform, they were entitled to 10 days' credit on their 18 months sentence in the penitentiary . . . ." Id. at 1046.

This Court's opinion in King then plainly forbids a district court to impose upon a convict a sentence that subjects him to "more punishment than the legal maximum for his offense." 69 U.S. App. D.C. at 14 n. 3, 98 F.2d at 295 n. 3. The reason for this rule is equally plain. "It would be an injustice, as well as flagrant invasion of . . . legal rights, to require [convicts] . . . to serve their terms, or any part thereof, twice." 220 S.W. at 1046.

That this rule and its reason have continuing vitality, and indeed a basis of Constitutional dimension, is demonstrated by Hayes v. United States, 102 U.S. App. D.C. 1, 249 F.2d 516 (1957), cert. denied, 356 U.S. 914 (1958).

Hayes was first sentenced to a prison term shorter than the minimum established by statute. Two months later, the Court increased the sentence to the required minimum. Although this action was affirmed on appeal, this Court concluded its opinion thusly:

> "We assume that to avoid double jeopardy the resentence must be made effective as of the date of the original sentence; that is, that the defendant is not required to serve again the time he has been imprisoned by reason of the invalid sentence." Id. at 3-4, 249 F.2d at 518-19.

The sentence imposed below requires appellant to be imprisoned for minimum and maximum periods of time in excess of those permitted by statute. Appellant is in fact being imprisoned for a minimum term that exceeds the statutory maximum. Notwithstanding the plain warning of King, the Court below has subjected appellant to "more punishment than the legal maximum for his offense." Notwithstanding the reasoning of Hayes, appellant has been "required to serve again the time he has been imprisoned by reason of the invalid sentence imposed" upon the conviction that this Court previously reversed. 8/

In addition to acting contrary to the prior opinions of this Court, the Court below has equally ignored rulings by three other courts of appeals, see Ekberg v. United States, 167 F.2d 380 (1st Cir. 1948); Youst v. United States, 151 F.2d 666 (5th Cir. 1945); McDonald v. Moinet, 139 F.2d 939 (6th Cir.), cert. denied,

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8/ By reason of the administrative application of 18 U.S.C. § 3568, appellant's prior sentence of four to twelve years was deemed to have started on the day of his arrest.

322 U.S. 730 (1944), and the decisions of many state appellate tribunals.[9/]

Thomas Williams v. United States, ____U.S. App. D.C. ____, 335 F.2d 290 (1964), does not support the action below. Williams expressly conceded that he might not be subjected to imprisonment greater than the statutory fifteen year maximum.[10/] He placed reliance on the crediting provisions added to 18 U.S.C. § 3568 in 1960, even though Congress expressly excepted from this amendment sentences, such as Williams', imposed before October 2, 1960. 74 Stat. 738 (1960). In contrast, in appellant's case the very same amendment demonstrates that the Court below acted contrary to the congressional intention that credit be given for presentence imprisonment of convicts such as appellant. See Subpart C of Part V of this Brief.

9/ For supporting state cases in addition to Jackson v. Commonwealth, supra, see, e.g., Tilghman v. Mayo, 82 So. 2d 136 (Fla. 1955); Lewis v. Commonwealth, 329 Mass. 445, 108 N.E.2d 922 (1952); State v. Searcy, 251 N.C. 320, 111 S.E.2d 190 (1959); Application of Cannon, 203 Ore. 629, 281 P.2d 233 (1955); Commonwealth ex rel. Townsend v. Burke, 361 Pa. 35, 63 A.2d 77 (1949); Ex parte Bonds, 309 S.W.2d 239 (Tex. Crim. App. 1958); Kline v. State, 41 N.J. Super. 391, 125 A.2d 311, 314 (App. Div. 1956); Stonebreaker v. Smyth, 187 Va. 250, 46 S.E.2d 406 (1948); Frye v. Delmore, 47 Wash. 2d 605, 288 P.2d 850, 852 (1955).

10/ Williams did not attack his sentence until after he had completed the minimum term imposed upon him.

In finding Thomas Williams' sentence lawful, this Court thought dispositive under Section 3568 that the imprisonment for which Williams sought credit was "confinement in custody otherwise than under a sentence." 335 F.2d at 291. Williams did not and could not claim that he had been imprisoned prior to sentencing because of poverty. Charged with a capital offense, he was held without bail. See Fed. R. Crim. P. 46(a)(1). Compare Holloway v. United States, D.C. Cir. No. 18,017, decided November 5, 1964. Appellant, in contrast, was imprisoned prior to sentencing solely because of his poverty. Furthermore, virtually all the imprisonment that appellant claims must be considered in determining the maximum additional imprisonment he may suffer was "confinement in custody . . . under a sentence" previously imposed on an invalid conviction based on the same facts as the instant case. Compare Hayes v. United States, supra; King v. United States, supra.[11/]

11/ The Thomas Williams opinion does not cite Hayes v. United States, supra; King v. United States, supra; or De Benque v. United States, supra. Nor, apparently, were any of those cases cited by the parties to the Williams case. The only case cited in the Williams opinion is Epperson v. Anderson, 117 U.S. App. D.C. 122, 326 F.2d 665 (1963), which involved no claim of illegality in sentence, and which decided that there was no abuse of discretion in refusing to credit a convict with 52 days imprisonment prior to sentencing.

Notably, the government did not claim that Thomas Williams could be lawfully imprisoned for longer than the statutory maximum. Rather, relying on Williams' concession that he might not be imprisoned beyond that maximum period, the government argued that the petition for relief was premature and that if Williams "finds himself still behind bars after fifteen years have rolled by, he might then wish to present the matter anew to the court." Brief for Appellee, pp. 7-8, Thomas Williams v. United States, supra.

Nor could the government have argued that Thomas Williams may lawfully be imprisoned for longer than the statutory maximum. For, but two months before, the government had conceded in substance that such imprisonment would be unlawful.

In Harry C. Williams v. United States, D.C. Cir. No. 18,399, decided per curiam on April 23, 1964, the government was faced with the need to distinguish McDonald v. Moinet, supra. The government argued that in McDonald, "a 35 year sentence was imposed for an offense which carried a 25 year maximum. Four years after sentence was imposed, it was vacated and the defendant was re-sentenced to 25 years [commencing on the day of re-sentencing, see 139 F.2d at 940-41]. The second sentence

was ordered [on appeal, id. at 941] to commence as of the date when the illegal sentence was imposed. Had the defendant not been credited for time already served, the Court would have done indirectly what it could not have done directly, i.e., it would have ordered the defendant's incarceration for a period longer than was allowed by statute." Brief for Appellee, pp. 9-10 n. 7, Harry C. Williams v. United States, supra.

As the government put it in the Harry C. Williams case, the Court below did "indirectly what it could not have done directly . . . it . . . ordered the defendant's incarceration for a period longer than was allowed by statute."

As the government itself recognized in Harry C. Williams, the sentence imposed upon appellant is therefore unlawful and must be reversed. The Court below should be directed to pronounce a new sentence that, to the greatest extent possible, will place appellant in no worse position than had he been sentenced to the maximum term of one to three years imprisonment on the day his imprisonment in fact began.[12/]

12/ Had appellant been sentenced to such a maximum imprisonment on September 15, 1962, he would have become

(Cont'd)

II. THE SENTENCE IMPOSED BELOW PUNISHES APPELLANT TWICE IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

The Fifth Amendment to the Constitution commands, "No person shall . . . be subject for the same offence to be twice put in jeopardy . . . ."

This constitutional provision does not simply prohibit an accused from being tried twice for the same offense:

(Cont'd)

eligible for parole on September 15, 1963, and in no event would have been imprisoned beyond September 15, 1965. Assuming that appellant would have earned -- as he had to the date of sentencing below -- the maximum good conduct credits permitted by statute, he would have been entitled to be released from confinement on January 6, 1965. With the extra credit he earned for heroism, he would have been entitled to be released on December 7, 1964. He would have been entitled to be free of supervision on February 19, 1964. (Counsel miscalculated these dates below. See Letter, p. 11.)

Thus, upon reversal, the appropriate course would be to require the Court below to determine whether appellant has continued to earn good conduct credits. The Court below should be required then to pronounce a sentence that would entitle appellant to be released no later than on a date determined by adding to December 7, 1964, such good conduct credits -- if any -- of which appellant has been deprived by reason of his conduct, and that would permit his supervision as on parole no later than February 19, 1964. This result may be achieved either through imposition of a suspended sentence or a split sentence under 18 U.S.C. § 3651. If on remand further confinement were to prove lawful, the new sentence should permit, and the Court below should require, see Bolden v. Clemmer, Civ. No. 3111-M, E.D. Va., February 18, 1964 (unreported) an immediate parole hearing.

> "For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment . . . which is the real danger guarded against by the Constitution. . . .
>
> "The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." Ex parte Lange, 85 U.S. (18 Wall.) 163, 173 (1873).

In Lange, the accused had been sentenced to both fine and imprisonment. The statute permitted fine or imprisonment, but not both. After the fine was paid and part of the imprisonment served, the trial court vacated its first judgment and imposed a new sentence of imprisonment only. But, because the fine had been paid, the Supreme Court held unconstitutional any sentence of imprisonment. Because the statute did not provide for both fine and imprisonment, any such imprisonment would "put [the convict] to actual punishment twice for the same thing." Id. at 175. Indeed, the double jeopardy clause would have prohibited imprisonment even had the court offered to repay the fine. In re Bradley, 318 U.S. 50 (1943).

This appeal presents the question whether the sentence imposed upon appellant subjects him to a second punishment contrary to the rationale of Lange.

As Lange demonstrates, to determine whether a man has been "twice punished for the same offence," the punishment actually inflicted must be compared to the "punishments mentioned in the statute." 85 U.S. (18 Wall.) at 174. As Lange holds, any punishment inflicted in excess of the statutory limit is a second punishment that is invalid under the double jeopardy clause.

The starting point for determing here the "punishments mentioned in the statute" is D.C. Code § 22-2902. That statute and D.C. Code § 24-203(a) require that a person convicted of attempted robbery suffer not more than one to three years imprisonment. Further, a person sentenced to this maximum term is entitled to earn good conduct credits that would require his release after a maximum imprisonment of 27 1/2 months. 18 U.S.C. § 4161.

Appellant was imprisoned for over two years prior to his sentencing below. That imprisonment was punishment, even though it was not imposed upon a valid judgment of conviction. See Yates v. United States, 356 U.S. 363 (1958); King v. United States, 69 U.S. App. D.C.

at 12-13, 98 F.2d at 293-94. The sentence imposed below added one to three years imprisonment to the more than two years imprisonment appellant had already suffered. By this sentence the Court below inflicted double punishment upon appellant in three separate ways:

1. The statutes require that a person convicted of attempted robbery receive a minimum sentence of no more than one year. After suffering this minimum term he becomes eligible for parole. D.C. Code § 24-204. Appellant, however, will not become eligible for parole until September 25, 1965 -- when he will have suffered more than three years imprisonment.

2. The statutes require that no person convicted of attempted robbery suffer more than three years imprisonment. Appellant, however, may be imprisoned until September 25, 1967 -- when he will have suffered more than five years imprisonment.

3. The statutes entitle a person sentenced to the maximum term for attempted robbery to earn good conduct credits that would require his release after only 27 1/2 months imprisonment. Appellant, however, no matter how well he behaves in prison, and despite his extra credit for heroism, cannot become eligible for

release until January 16, 1967 -- when he will have suffered 52 months imprisonment.

In each of these three respects appellant is being "put to actual punishment twice for the same thing." 85 U.S. (18 Wall.) at 175. In violation of the double jeopardy clause of the Fifth Amendment, he is being required "to serve again the time he has been imprisoned by reason of the invalid sentence," Hayes v. United States, 102 U.S. App. D.C. at 4, 249 F.2d at 516, previously imposed upon him. His sentence must therefore be reversed.

III. THE SENTENCE IMPOSED BELOW INFLICTS CRUEL AND UNUSUAL PUNISHMENT UPON APPELLANT IN VIOLATION OF THE EIGHTH AMENDMENT

The Eighth Amendment to the Constitution forbids the infliction of "cruel and unusual punishments . . . ."

This Amendment constitutes "a precept of justice that punishment for crime should be graduated and proportioned to offense." Weems v. United States, 217 U.S. 349, 367 (1910). Thus, whether a given punishment is cruel and unusual depends not on the nature of the punishment but on the extent of the punishment in comparison to the severity of the crime. "The amendment must draw

its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

The death penalty, for example, is not cruel and unusual, at least when it is imposed without torture as punishment for a crime that has traditionally been capital in our society. In re Kemmler, 136 U.S. 436 (1890); see Trop v. Dulles, supra at 99.

But this does not mean that no punishment short of death is cruel and unusual. To the contrary, in appropriate circumstances either a fine or imprisonment may violate the Eighth Amendment. Nearly three centuries ago the House of Lords found cruel and unusual a fine of 30,000 pounds imposed for assault and battery. Lord Devonshire's Case, 11 Howell's State Trials 1354, 1370-71 (1689). "To be sure, imprisonment . . . is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." Robinson v. California, 370 U.S. 660, 667 (1962). As the Supreme Court held in Robinson, a single day of imprisonment is cruel and unusual if imposed because of

a condition -- such as physical or mental disease or addiction to narcotics -- over which the accused has no control.

When any imprisonment is attacked as cruel and unusual, the Court must consider whether the term is "so disproportionate to the offense as to constitute a cruel and unusual punishment." Weems v. United States, supra at 368, quoting from McDonald v. Commonwealth, 173 Mass. 322, 53 N.E. 874, 875 (1899). The meter for measurement is "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, supra at 101.

The precise question here presented is whether imprisonment for over three to five years is a cruel and unusual punishment when inflicted for the crime of attempted robbery. In this instance, it is Congress that has set the "evolving standards that mark the progress of" our society. Those standards are, of course, the statutory limitation of imprisonment for attempted robbery to a term of one to three years.

As demonstrated above,[13/] the imprisonment inflicted upon appellant surely exceeds the statutory

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13/ See Part II of this Brief.

limit and does so in three distinct respects. But, not only is appellant's imprisonment in excess of the statutory limit; it is "so disproportionate to the offense as to constitute a cruel and unusual punishment." 217 U.S. at 368.

Appellant is now being required to serve a minimum imprisonment of more than three years. Appellant's minimum is thrice as large as that set by statute. His minimum is indeed longer than the statutory limit on the maximum imprisonment for attempted robbery.

He is being required to serve a maximum imprisonment of more than five years. Even with maximum good conduct credits, this term is nearly twice the greatest possible imprisonment of a person serving one to three years who qualifies for maximum good conduct credits. Appellant's maximum imprisonment also exceeds by more than two-thirds the maximum imprisonment of three years that the statute exacts without credit for good conduct. It is two and one-half times larger than the average maximum sentence imposed below for attempted robbery.[14/]

14/ Statistics on file with the Administrative Office of the United States Courts show that in the fiscal years

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These results are summarized in the following chart:

	Maximum Imprisonment Before Becoming Eligible for Parole	Maximum Imprisonment Without Credit for Good Conduct	Maximum Imprisonment with Credit for Good Conduct
Appellant's Imprisonment	36 mos.	60 mos.	52 mos.
Statutory Maximum Imprisonment of 1 to 3 Years	12 mos.	36 mos.	27.5 mos.
Average Prison Sentence Imposed Upon Conviction of Attempted Robbery in the District of Columbia: Fiscal 1963 and 1964	7.5 mos.	22.6 mos.	17 mos.

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1963 and 1964 -- i.e., from July 1, 1962 through June 30, 1964 -- the Court below sentenced 19 defendants to prison upon conviction of attempted robbery. These 19 defendants received an average maximum sentence of 22.6 months. (This number excludes periods of probation and sentences under the Youthful Offenders Act, 18 U.S.C. §§ 5005-26.) Upon earning maximum good conduct credits, a prisoner sentenced to 22.6 months would become entitled to release after serving approximately 17 months. Such a person would become eligible for parole after serving less than 8 months.

Certainly a sentence such as appellant's -- which contains elements up to thrice the statutory maxima -- must be reversed as "so disproportionate to the offense as to constitute a cruel and unusual punishment." 217 U.S. at 368.

In appellant's case this conclusion is even more necessary because his poverty is the sole factor that makes possible his imprisonment for more than three to five years on conviction of attempted robbery. Were he not a pauper -- were he even of only moderate means -- it is questionable whether he would have spent a single night in prison during the two years and ten days between his arrest and sentencing.

As a matter of fact, the extra two years imprisonment that appellant must suffer under the sentence imposed below punishes him for his poverty -- a condition over which he has no control. As a matter of law, a single extra day of imprisonment is cruel and unusual in these circumstances. Robinson v. California, supra.

IV. DUE PROCESS OF LAW REQUIRES THAT APPELLANT'S POVERTY NOT RESULT IN HIS SUFFERING IMPRISONMENT BEYOND THE MAXIMUM PERMITTED BY STATUTE

"Providing equal justice for poor or rich, weak or powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal." Griffin v. Illinois, 351 U.S. 12, 16 (1956) (plurality opinion).

The response to this "age-old problem" has been an age-old attempt to provide equality before the law for rich and poor alike. See Reginald H. Smith, Justice and The Poor 3 (1919). For three millennia the Bible has commanded, "Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty: but in righteousness shalt thou judge thy neighbor." Leviticus 19:15. Seven and one-half centuries ago Magna Carta declared, "to no one will we sell, to no one will we refuse or delay, right or justice." Magna Carta, cap. 40 (1215). Every justice and judge of the United States has pledged to "administer justice without respect to persons, and do equal right to the poor and to the rich . . . ." 1 Stat. 76 (1789), 28 U.S.C. § 453.

That the poor should have their rights without cost was accepted in the age of Bracton. See Pollock and Maitland, History of English Law 195 (2d ed. 1909). As long ago as 1495, an English statute established the right of "every poor person" to sue without payment of fees, with free subpoena, and with assignment of counsel. 23 Hen. VII, c. 12.

In the United States, the quest for "equal right to the poor and to the rich" in criminal prosecutions is as old as the Republic.

The first Congress commanded the Federal courts to assign counsel to indigents accused of capital crimes. 1 Stat. 118 (1790), 18 U.S.C. § 3005.

More than a century ago, Congress authorized the Federal courts to subpoena and to pay an indigent defendant's witnesses. 9 Stat. 74 (1846); see Fed. R. Crim. P. 17(b).

The Sixth Amendment requires the appointment of counsel to represent an indigent from preliminary hearing through appeal. E.g., Johnson v. Zerbst, 304 U.S. 458 (1938); Johnson v. United States, 352 U.S. 565 (1957); Evans v. Rives, 75 App. D.C. 242, 126 F.2d 633 (1942); see Blue v. United States, D.C. Cir. No. 18,401, decided October 29, 1964; D.C. Code § 2-2201 to § 2-2210.

When first presented with the question, the Supreme Court decided that a Federal court has inherent power to order the government to pay for a transcript for an indigent's use on appeal. "The indigent defendant ought not to be deprived of availing himself of his writ of error because of his poverty . . . ." United States v. Jones, 193 U.S. 528, 530 (1904). When the courts retreated from this position, e.g., United States ex rel. McNeill v. Avis, 108 F.2d 457 (3d Cir. 1939); Estabrook v. King, 119 F.2d 607 (8th Cir. 1941), Congress overruled the resulting aberration. See 58 Stat. 6 (1944), 28 U.S.C. §§ 753(f), 1915(a).

Our constitutional traditions are so concerned with the quest for equal justice for the poor that the state governments, as well as the Federal sovereign, "In criminal trials . . . can no more discriminate on account of poverty than on account of religion, race, or color." Griffin v. Illinois, 351 U.S. at 17. Every state must provide counsel at trial, Gideon v. Wainright, 372 U.S. 335 (1963), on appeal, Douglas v. California, 372 U.S. 353 (1963), and at arraignment, if that be "a critical stage," White v. Maryland, 373 U.S. 59 (1963). A state must provide a free transcript on direct appeal from a conviction, Griffin v. Illinois, supra; Eskridge v.

Washington, 357 U.S. 214 (1958), or on collateral attack, Lane v. Brown, 372 U.S. 477 (1963). A state may not require a filing fee on direct appeal, Burns v. Ohio, 360 U.S. 252 (1959), or in habeas corpus proceedings, Smith v. Bennett, 365 U.S. 708 (1961).

Thus, in the American States, "a procedure, based on indigency alone, does not meet constitutional standards." Lane v. Brown, supra at 485. State criminal prosecutions experience this stricture because of the due process and equal protection clauses of the Fourteenth Amendment. "[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" as part of "the due process of law guaranteed by the Fifth Amendment to the Constitution." Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

Thus, despite his poverty, appellant was entitled to, and received, the advice of appointed counsel. Witnesses were summoned at government expense. Full transcripts were provided. Appeal was without costs.

These procedural safeguards given appellant were not ends in themselves. They were rather the means by which the Courts implemented the Constitutional requirement that appellant not "be deprived of . . . liberty . . .

without due process of law . . . ." "It is the punishment . . . which is the real danger guarded against by the Constitution." Ex parte Lange, 85 U.S. (18 Wall.) at 173. Only by an astonishing anomaly could the same Constitution that gave appellant all the procedural safeguards necessary to avoid an unlawful conviction at the same time permit two years extra imprisonment to result from his poverty. Yet this is precisely the result of the sentence imposed below.

Appellant was arrested on September 15, 1962. He was first sentenced on February 15, 1963. On appeal, the conviction underlying that sentence was reversed -- but not until July 16, 1964. The mandate of reversal was presented to the Court below on August 20, 1964.

Throughout all of these proceedings appellant was imprisoned. At any time during that imprisonment the possession of $300 would have enabled him to be freed on bond. At no time did he have the necessary $300. Solely because of this lack of funds, he remained in jail from the day of his arrest, September 15, 1962, until the day of his sentencing below, September 25, 1964.

Beyond question had appellant been free on bond from September 15, 1962, until September 25, 1964, the

Court below could not have sentenced him to a prison term greater than one to three years.

Thus, were appellant not a pauper, it would have been impossible for the United States to require him to spend over three to five years in prison on the judgment of conviction entered against him.

No man of even moderate means could be required to spend a minimum of over three years in prison for attempted robbery -- the statutes set a one year limit on the minimum imprisonment.

No man of even moderate means could be required to spend a maximum of over five years in prison on this charge -- the statutes set a maximum imprisonment of three years.

No man of even moderate means could be required to spend more than 27 1/2 months in prison -- if he earned all the good conduct credits to which the statute entitles him.

If the sentence of the Court below stands unreversed, the Constitutional promise not to be deprived of liberty without due process of law "would under such circumstances be [a] meaningless promise . . . to the poor." Griffin v. Illinois, supra at 17. If the effect of the financial resources of the accused upon the outcome of

the prosecution are to remain "a neutral fact -- constitutionally an irrelevance," Edwards v. California, 314 U.S. 160, 184-85 (1941) (Jackson, J., concurring), the sentence imposed below must be reversed.

V. THE COURT BELOW ABUSED ITS DISCRETION IN REFUSING TO CREDIT APPELLANT WITH THE IMPRISONMENT HE SUFFERED BETWEEN ARREST AND SENTENCING

Even assuming arguendo that the sentence imposed below offends neither statute nor Constitution, the District Court unquestionably had the discretionary authority to credit appellant with his presentence imprisonment and the deductions he earned for good conduct and heroism. Although urged to exercise its discretion in appellant's favor, the Court below refused to do so.

That refusal, appellant submits, is without foundation in fact and contrary to the expressed intention of Congress. It is, moreover, contrary to this Court's opinion in Holloway v. United States, D.C. Cir. No. 18,017, decided November 5, 1964.

A. This Court Has and Should Exercise the Power To Examine the Sentence Imposed Below For Abuse of Discretion

Preliminarily, the question of this Court's power to consider the question of abuse of discretion must be

considered, for several Federal courts of appeals have categorically denied the existence of such power. E.g., United States v. Rosenberg, 195 F.2d 583, 605-07 (2d Cir. 1952); Freeman v. United States, 243 Fed. 353 (9th Cir. 1917); cert. denied, 249 U.S. 600 (1919).

Other courts of appeals, including this Court, have expressly or by implication recognized the existence of power to review otherwise proper sentences for abuse of discretion. See Holloway v. United States, D.C. Cir. No. 18,017, decided November 5, 1964 (by implication); Epperson v. Anderson, 117 U.S. App. D.C. 122, 326 F.2d 665 (1963) (by implication); United States v. Wiley, 278 F.2d 500 (7th Cir. 1960); Scott v. United States, 165 Fed. 172 (5th Cir. 1908). Moreover, 28 U.S.C. § 2106 gives the courts of appeals power to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review . . . ." There is no reason to believe that this authority applies with less force to judgments imposing imprisonment than to other judgments.[15/]

15/ The contrary view is probably based on a misinterpretation of the intention of Congress in establishing the

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In any event, the abstract question of power should have been put to rest by Yates v. United States, 356 U.S. 363 (1958). Yates had been sentenced to a year's imprisonment for criminal contempt. She served 15 days of that sentence, and, in addition, spent 6 1/2 months in prison in the course of the proceedings from which the contempt conviction resulted. Considering only the propriety of the one year sentence the Supreme Court concluded:

> "[T]his Court is of the view, exercising the judgment that we are now called upon to exercise, that the time that petitioner has already served in jail is an adequate punishment for her offense in refusing to answer questions . . . . Accordingly, the writ of certiorari is granted, and the judgment of the Court of Appeals is vacated and the cause remanded to the District

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courts of appeals in 1891. Prior to that year the old circuit courts had the power when affirming criminal sentences "to proceed to pronounce final sentence." 20 Stat. 354 (1879). This language was omitted from the Act of 1891 establishing the courts of appeals, although at the same time the predecessor of § 2106 was enacted. Although the Supreme Court early held that the Act of 1891 gave the courts of appeals the power to "remand with directions to render such proper judgment as the case might require, upon writs of error in criminal cases," Ballew v. United States, 160 U.S. 187, 201-02 (1895), the Ballew doctrine has apparently not been applied to judgments of imprisonment.

> Court with directions to reduce the sentence to the time petitioner has already been confined in the course of these proceedings." Id. at 367.

The opinion in Yates has since been explained as resting on the fact that "there is no statutory limit upon a District Court's sentencing power in cases of criminal contempt . . . ." Brown v. United States, 359 U.S. 41, 52 (1959). As the facts of Brown demonstrate, the absence of a statutory limitation on the length of sentence justifies careful appellate review in cases of criminal contempt, even though a sentence in excess of one year is rare and a 15 month sentence is apparently the longest ever affirmed on appeal. See id. at 57-59 (Warren, C. J., dissenting), and authorities there collected.

This rationale may be thought a limitation jurisdictional in nature.[16] It may be but a description of the circumstance that must exist before a federal

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16/ In Gore v. United States, 357 U.S. 386, 393 (1958), the Supreme Court stated, without referring to the decision it had rendered two months previously in Yates, that it was without power to increase or to reduce sentences. See also Rosenberg v. United States, 344 U.S. 889 (1952) (memorandum of Frankfurter, J., on denial of rehearing); Blockburger v. United States, 284 U.S. 299, 305 (1932).

appellate court should review a sentence for abuse of discretion. In either event, the same rationale applies to the instant case.

Neither statute nor case law limits the possible length of imprisonment of an impoverished accused committed from arrest through appellate review. In practice such imprisonment is apparently at least of length equal to the average sentence imposed for criminal contempt.[17/] Even though appellant's case took far longer than average,[18/] other cases have taken even longer from arrest to ultimate rendition of a valid judgment of conviction.[19/] There is therefore as much reason for exercising the power to review a

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17/ In the fiscal year ending June 30, 1963, the average appeal in this Court required approximately 8.9 months from the filing of notice of appeal to final disposition. See Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts 1963, at pp. 192-93. Compare the authorities collected at 359 U.S. at 57-59.

18/ Appellant applied for leave to appeal from his original conviction in forma pauperis on February 15, 1963. This Court's final decision was not rendered until 17 months later, July 16, 1964.

19/ An extreme example is United States v. Stewart. Stewart was indicted in April 1953 for a murder committed the preceding month. The District Court three times found Stewart guilty and sentenced him to death. Each time the conviction was reversed, twice by this Court and once by

sentence for abuse of discretion in this case as exists in cases involving criminal contempt.

Furthermore, when a District Court refuses -- as it did here -- to credit an impoverished accused with the time he was imprisoned before and during trial and while prosecuting a successful appeal from the resulting conviction, the District Court intimately and directly hinders the power of this Court to administer justice without regard to the financial means of those who appeal criminal convictions. Though an accused's poverty may require his imprisonment while pursuing his right to a fair trial and orderly appellate review, that poverty should have no effect on the protection that the right to trial and appeal give an accused. When reversal occurs and retrial results in conviction, to permit an accused's poverty to increase the total imprisonment

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the Supreme Court. See Stewart v. United States, 366 U.S. 1 (1961); Stewart v. United States, 101 U.S. App. D.C. 51, 247 F.2d 42 (1957); Stewart v. United States, 94 U.S. App. D.C. 293, 214 F.2d 879 (1954). The third reversal by the Supreme Court occurred eight years after indictment, and still no valid judgment of conviction had been entered.

he suffers is to diminish by that added imprisonment the value of appellate review to the pauper. The present case thus particularly calls for review for abuse of discretion in the exercise of this Court's "supervisory control of the District Court in aid of its appellate jurisdiction," United States v. Wiley, supra at 503.

B. The Record Does Not Support A Refusal to Credit Appellant With His Presentence Imprisonment

By refusing to give any consideration to appellant's presentence imprisonment, the Court below has required him to serve more than three to five years in prison on a conviction of attempted robbery. Appellant must serve a minimum imprisonment greater than the maximum term set by statute. His maximum imprisonment may exceed by more than two-thirds the maximum set by statute. He has been deprived of good conduct credits to which his behavior during his presentencing imprisonment entitled him. He has been deprived of the 30 days credit awarded him for heroism.

This has occurred solely because of appellant's poverty. It has occured despite his having been an

exemplary prisoner for two years, and despite the fact that were appellant to be released soon, he would find both a home and a job awaiting him.[20/] It occurred even though at the time of sentencing appellant had already been imprisoned for longer than the average maximum imprisonment of first release felony prisoners convicted in this jurisdiction of assault, auto theft, and larceny - theft. See Federal Bureau of Prisons Statistical Tables Fiscal Year 1963, at p. 21.[21/]

The Court below not only refused to give appellant credit for his presentencing imprisonment, but the Court did not indicate what factors lead to its refusal. It is questionable whether any circumstance would justify a District Court in refusing to give credit for presentence imprisonment that resulted -- as did appellant's --

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20/ Below appellant asked that he be placed on probation. Appellant's counsel determined, and informed the Court, that were probation granted appellant would have a home with his sister and a job with a former employer. See Letter from Harris Weinstein to The Honorable Henry A. Schweinhaut, supra at pp. 5-6.

21/ By the time of sentencing, appellant's counsel had been unable to obtain statistics relating to imprisonment for attempted robbery. These statistics, set forth in Part III of this Brief, demonstrate that at the time of his sentence appellant had been imprisoned for a period longer than the average maximum sentence imposed in this jurisdiction for attempted robbery during the two fiscal years preceding sentencing below.

solely from the accused's poverty. Any other result would mean that the right to a fair trial and appellate review would be of far lesser value to the indigent than to those of wealth or even moderate means. At the very least, where no reason is given for requiring an impoverished accused to serve over two years longer in prison than could be required of one not a pauper, that action must be deemed an abuse of discretion.

C. The Court Below Acted Contrary To The Intention Of Congress That Credits For Presentencing Imprisonment Should Be Granted Wherever Possible

Before 1932, no federal statute governed the granting of credits for presentencing imprisonment. Neither did a statute control the extension of imprisonment that could result from the confinement that a convict suffered while awaiting transportation to the penal institution where he was to serve his sentence. The result was injustice and confusion.

> "[I]t was quite usual in sentencing a convicted person to impose the statutory penalty and give credit for such time as he had been confined in jail awaiting trial. This sometimes led to an arbitrary construction of the commitment by the jailer, which tended to deprive the prisoner of the credit intended to be given

> by the court. It also frequently happened that after sentence the prisoner would be detained in a local jail awaiting transportation to the penal institution in which he was to be confined for the service of the sentence. Credit on the term could not be given for this imprisonment unless the commitment so provided." Eyler v. Aderhold, 73 F.2d 372, 373 (5th Cir. 1934); see, e.g., Buie v. King, 137 F.2d 495 (8th Cir.), cert. denied, 317 U.S. 689 (1942).

Therefore, in 1932 Congress enacted the predecessor of 18 U.S.C. § 3568:

> "The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence.
>
> "If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.
>
> "No sentence shall prescribe any other method of computing the term." 47 Stat. 381 (1932).

By this statute Congress made plain when service of a sentence begins and made impossible the extension of imprisonment through delay in transporting the convict to the penal institution.

Although Congress apparently then chose not to require sentencing courts to give credit for presentence imprisonment,[22] the 1932 Act presented a sure and simple method for the judge who decided to give such credits. After determining the total amount of imprisonment thought proper, the judge could deduct from that amount the credits he thought appropriate, and sentence the convict to the difference. The automatic operation of the statute then insured that the Court's intention would not be thwarted.

In 1960 Congress amended the 1932 Act. In doing so, Congress demonstrated an expectation and intention that thenceforth sentencing judges would credit convicts with presentence imprisonment wherever possible.

Under Section 3568 as it existed from 1932 to 1960:

> "a person charged with violating a statute requiring the imposition of a minimum mandatory sentence may not be credited with the time spent in custody

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22/ See 75 Cong. Rec. 10352-53, 10358 (1932). Congress may well have assumed, as has this Court for 27 years, see Part I of this Brief, that in no event would a convict be required to serve an imprisonment greater than maximum required by statute.

> for want of bail while awaiting trial. The result is that a sentencing court lacks authority to differentiate between the offender who has been free on bail before trial and one who has been in custody, because it is required to impose the same minimum mandatory sentence as to each." Letter from Lawrence E. Walsh to The Honorable Emanuel Celler, June 24, 1964, reprinted in H.R. Rep. No. 2058, 86th Cong., 2d Sess. (1960).

To overcome this problem the Senate voted to add the following to the first sentence of Section 3568:

> "Provided, That the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody for want of bail set for the offense under which sentence was imposed." S. 2932, 86th Cong., 2d Sess. (1960); see 106 Cong. Rec. 14687 (1960).

The House then added to this proviso the language "where the statute requires the imposition of a minimum mandatory sentence."[23] 106 Cong. Rec. 15820. However, it was not the purpose of the House to limit

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23/ The House also added the phrase "prior to the imposition of sentence" in order "to exclude credit for time spent in custody after sentence, such as while on appeal." H.R. Rep. No. 2058, 86th Cong., 2d Sess. (1960). The problem of credit for imprisonment pending appeal is handled by Fed. R. Crim. P. 38(a)(2), which leaves to the convict the determination whether imprisonment pending appeal should apply to his sentence.

by this language the application of the Senate amendment to Section 3568. To the contrary, the language added by the House was designed to make certain that the amendment was broad enough to fulfill the existing need:

> "The sponsors of this bill, as well as the Department of Justice, point out that this law is needed where the statute requires a minimum mandatory sentence in order to give a defendant credit for the time spent in custody prior to trial and sentence. In order to clarify the intent, it was decided to expressly spell out in the text of the bill the fact that this provision applies where the statute requires the imposition of a minimum mandatory sentence." H.R. Rep. No. 2058, supra.

The House Amendment clarified beyond doubt that the 1960 amendment to Section 3568 applies to cases where Congress has required a minimum mandatory sentence. This amendment created a simple mandatory procedure for crediting the convict in such cases with presentence imprisonment: the Attorney General is expressly directed to give the appropriate credit.

No amendment was necessary to provide like credits in cases where no minimum mandatory sentence is required. The courts continue to have the power to grant such credits by the procedure appropriate under the 1932 Act.

But Congress in 1960 could not have expected or intended that the granting of such credits would remain wholly within the District Court's discretion. Otherwise the Attorney General would have an absolute duty to grant the credits for more serious crimes, while the courts would be free to refuse the credits for less serious crimes.

The phrase in Section 3568, "where the statute requires the imposition of a minimum mandatory sentence," is apparently administratively interpreted to refer to statutes by which Congress has required that persons convicted of particular crimes "shall suffer imprisonment for not less than" some fixed period.[24/] Where Congress has thus placed a lower limit on the minimum sentence

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24/ See, for example, D.C. Code § 22-2901, which requires that an accused convicted of robbery "shall suffer imprisonment for not less than six months . . . ." It should be noted, however, that notwithstanding the provisions of statutes such as § 22-2901 persons convicted of some such crimes need not be imprisoned and may be placed on probation. See 18 U.S.C. § 3651. . It is questionable that the administrative interpretation of § 3568 is the correct one. The language of the statute provides no greater reason for applying § 3568 to crimes such as robbery than to crimes such as attempted robbery, for which the indeterminate sentence law, D.C. Code § 24-203(a), makes mandatory the imposition of a minimum sentence "not exceeding one-third of the maximum sentence imposed . . . ."

that may be imposed as punishment for a crime, it has made a judgment that that crime is more serious and a greater threat to society than crimes not having such a prescribed minimum sentence.

By the 1960 amendment, Congress thus granted to persons convicted of the more serious crimes the maximum possible credit for presentencing imprisonment. In the absence of statutory language expressly denying the same credits to persons convicted of the less serious crimes, there is no reason for concluding that the courts should remain free to refuse credits to such persons. Rather, Congress, in amending Section 3568 in 1960 must have intended and expected that the District Courts would grant credits for presentencing imprisonment wherever possible, and that Section 3568 would require the Attorney General to grant such credits where the courts are without power to do so. By refusing to credit appellant with his presentence imprisonment, the Court below frustrated this Congressional expectation.

D. A Recent Decision of This Court Requires Reversal of Appellant's Sentence

That the Court below has committed reversible error is further demonstrated by this Court's recent

opinion in Holloway v. United States, D.C. Cir. No. 18,017, decided November 5, 1964. There the appellant suffered 17 months imprisonment between his arrest and this Court's reversal of his conviction. Upon reversing this Court ruled:

> "Since appellant had been in jail almost 17 months, 12 of which occurred after his sentencing the same day on both the present conviction and the probation revocation, and five of which occurred after this court had ordered him released on bond, it seems clear that he will be entitled to credit, either against his present liabilities under the probation revocation or against the sentence, if any, ultimately imposed on retrial of the present case." Slip opinion, p. 6.

In Holloway this Court thought "it seems clear that" persons in appellant's position "will be entitled to credit" for imprisonment served while pursuing and preserving their rights at trial and successfully seeking reversal of the resulting conviction. The Court below not only thought this unclear; it did precisely the opposite of what this Court in Holloway said should be done. The sentence imposed upon appellant should therefore be reversed with directions that he receive the same sort of credits to which this Court held Holloway entitled.

CONCLUSION

For the foregoing reasons the judgment of sentence below should be reversed, and the case remanded with directions to pronounce a new sentence that places appellant in a position equivalent with that which would have obtained had his imprisonment since his arrest been pursuant to the maximum statutory term of imprisonment of one to three years.

Respectfully submitted,

/s/ Harris Weinstein

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,940

WILLIE L. SHORT, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
BARRY I. FREDERICKS,
MARTIN R. HOFFMANN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. Can appellant claim credit for pre-sentence incarceration where the statutes allow credit in but one circumstance which does not obtain in appellant's case?

2. Appellant pleaded guilty to an attempt to commit robbery in lieu of prosecution under a two-count indictment charging assault with intent to commit robbery (on which he had been convicted, but procured reversal); he was thereupon sentenced to the maximum sentence on his plea, without credit for pre-sentence incarceration. As to his constitutional rights

a) Was he subjected to double jeopardy, which does not apply to the "double punishment" he asserts, and whereunder he would be deemed to have waived jeopardy of the former sentence if it did apply?

b) Was he denied due process by his incarceration in lieu of bond set on four crimes of violence, where he never sought to have bail reduced, never proved his poverty (or that poverty prevented his release on bond), never made election not to commence service of his earlier sentence and never applied for bond pending appeal?

c) Was he subjected to cruel and unusual punishment by imposition of the maximum sentence for the lesser charge to which his plea was entered?

3. Where a sentence is pronounced that conforms to statutory requirements, and it is clear the judge has exercised his discretion, is the resulting sentence reviewable on appeal?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By appellant's plea of guilty on September 17, 1964, he confessed an attempt to rob Joseph Nelson at gunpoint in the latter's grocery store on August 3, 1962. The court imposed a sentence of one to three years on September 25, 1964. 22 D.C.C. 2902. This appeal followed.

Appellant's confinement

Appellant was arrested by North Carolina authorities on September 13, 1962, on a state charge of assault with a deadly weapon; on September 16, 1962, having waived extradition he was returned to the District of Columbia;

on September 17, 1962, he was arraigned in the Court of General Sessions where he waived preliminary hearing and bond was set at $1,500. The crime for which he was held was the transaction supporting his present conviction.

Indictment followed on October 8, 1962 (Criminal No. 835-62). In addition to the grocery store incident, the dockets show appellant further was called to account for three separate robberies (Criminal Nos. 834-62, 836-62 and 847-62). As to each of these, bond in the amount of $2,500 was set.[1] After pleading not guilty to all indictments, appellant was returned to jail. At no time therefollowing was motion to reduce bond forthcoming, nor request for release on personal recognizance.

Appellant was found guilty in No. 834-62 (robbery) after a jury trial ending on December 19, 1962. A guilty verdict in No. 835-62 (assault with intent to rob) similarly was returned on January 22, 1963. Sentence in each case was from four to twelve years, imposed on February 15, 1963, to run concurrently. Following sentencing, dismissal of Nos. 836-62 and 847-62 was allowed by the court on the motion of the government. Appeal of the convictions was noted; on February 27, 1963, appellant refused to sign an election against service of sentence. Appeals from the convictions reached this court, No. 834-62 as 17,691 and No. 835-62 as 17,689. On January 31, 1964, on appellant's motion, an appeal bond of $3,500 was set by this Court.

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[1] No. 834-62 charged appellant and two others with robbery of $772.00 on July 28, 1962; No. 835-62 charged appellant with two counts of assault with intent to rob on August 3, 1962 (evidence adduced at trial indicated that a planned robbery was aborted when the grocery store proprietor and his wife resisted and chased the bandits from the store); No. 836-62 charged appellant and one other with robbery of $220.00 on June 25, 1962; No. 847-62 charged appellant with two counts of robbery of $764.00 on July 13, 1962. It was of record in the previous trial that appellant had confessed these crimes within minutes of confrontation by Metropolitan Police. *Short* v. *United States*, Nos. 17,689 and 17,691, decided July 16, 1964.

The case was reversed by this Court sitting *en banc* on July 16, 1964. *Short* v. *United States*, *supra*. The mandate reached the District Court in August 1964; the case was then ripe for further proceedings in accordance with the *en banc* opinion. The docket reflects no motion for bond in either case upon return to the District Court.

Attempt to commit robbery

On September 17, 1964, proceedings were held in the District Court on the two indictments. Appellant through his counsel announced satisfaction with the fact the indictments were valid, indicating further his awareness that both cases against him could be retried, albeit without his confessions (September 17, Tr. 7, 9). Appellant then pleaded guilty to an information charging attempt to commit robbery (Criminal No. 849-64), having agreed the result of a plea would be "the same as if a jury had found you guilty," and having been reminded that the court had "power to give you three years" (September 17, Tr. 13-15). The facts he acknowledged in his plea specifically related to the basis for indictment in No. 835-62, the two-count indictment for assault with intent to commit robbery. The plea was entered expressly on the understanding the government would move to dismiss the two indictments.

At the September 25, 1964, sentencing, appellant appealed to the trial court's discretion to credit on any sentence which might be pronounced the time already spent in jail, as well as suggesting existence of a rule of law which would produce the same result (September 17, Tr. 4, 7-8). In aid of both contentions he had submitted a letter to the court citing circumstances and authorities. Appellant acknowledged that some twenty months before that time he had been a menace to society. It was urged, however, that in the intervening months appellant had learned his lesson, that if he were allowed probation the judge "would never see me back again" (September 25, Tr. 5-7, 15-16). Following imposition of sentence, the judge

took pains to point out to appellant that under the new sentence he would be eligible for parole a year sooner than under his previous sentence, in encouraging him to maintain the good behavior which would make him thus eligible. Dismissal of indictments in Nos. 834-62 and 835-62 then was allowed by the court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty, or property, without due process of law; * * *

The Eighth Amendment to the United States Constitution provides in pertinent part:

> Excessive bail shall not be required, * * * nor cruel and unusual punishments inflicted. * * *

Title 22, District of Columbia Code, Section 2902, provides:

> Whoever attempts to commit robbery, as defined in section 22-2901, by an overt act, shall be imprisonment for not more than three years or be fined not more than five hundred dollars, or both.

Title 18, United States Code, Section 3568, provides:

> The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: *Provided*, That the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the

statute requires the imposition of a minimum mandatory sentence.

If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

No sentence shall prescribe any other method of computing the term.

SUMMARY OF ARGUMENT

The statutes governing imposition of sentence on a federal prisoner are clear that unless the statute defining the crime for which he is committed prescribes a mandatory minimum, pre-sentence confinement is not required to be credited on the sentence.

Appellant's constitutional claims are without merit. Double jeopardy protection does not extend to his situation, even were he in fact subjected to "double punishment"; in any case in the contemplation of the law, he waived any "jeopardy" of time served on his void sentence by his appeal. Appellant's claim of due process infirmity, that he has been confined only because he is poor, not only has never been proved, but is not well taken. The right to be enlarged on bail is a qualified one, and all due process protections to secure adjustment of the amount of his bail were available to him. At no time did he invoke them. That the maximum sentence constituted cruel and unusual punishment cannot be successfully maintained, particularly in view of appellant's express pre-sentence agreement and plea to a reduced statement of culpability for his crime.

Where it is clear that where a sentencing judge has exercised his discretion, and the penalty he prescribes is within statutory limits, the sentence cannot be reached for modification on appeal. Even were it otherwise, the sentence in the instant case was no abuse of discretion.

ARGUMENT

I. Appellant's sentence conforms to statutory requirements.

Appellant received a one-to-three-year sentence after pleading guilty to an information charging him with an attempt to commit robbery. He does not question the power of the judge under the statutes to impose sentence. Rather he urges this sentence is illegal because—in contravention of statute—it fails to take into account some two years' confinement occasioned by a prior conviction for assault with intent to commit robbery which appellant had successfully appealed. This contention is wholly without merit.

A sentence does not commence to run until the person sentenced has arrived at the institution where sentence is to be served, or has arrived at a place of detention to await transportation thereto. 18 U.S.C. § 3568. In terms, then, a sentence cannot run until after its pronouncement following conviction of the offense incurring the period of confinement. And see F. R. Crim. P. 32(a). The notion that appellant somehow served part of his sentence for attempt to commit robbery while confined under completely different conviction for assault with intent to commit robbery belongs to another statutory scheme than this. See *Williams* v. *United States*, —— U.S. App. D.C. ——, 335 F.2d 290 (1964).

Certain federal prisoners, however, are entitled to a credit at the outset of a period of confinement for time in custody prior to the imposition of the sentence. This credit—awarded by the Attorney General, not the sentencing judge—devolves upon those having been in custody prior to the imposition of sentence where that custody was for want of bail, and where the statute describing the offense for which the sentence was imposed requires the imposition of a minimum mandatory sentence. 18 U.S.C. § 3568. But appellant cannot claim such credit: the statute under which appellant's sentence was im-

posed prescribes no minimum. 22 D.C.C. 2902. And for that matter, neither does the statute under which the earlier conviction was obtained.[2] 22 D.C.C. 501.

In no other way can the earlier time served be salvaged under existing statutes: "No sentence shall prescribe any other method of computing the term." 18 U.S.C. § 3568; see *King* v. *United States*, 69 (App. D.C. 10, 12 n.1, 98 F.2d 291, 293 n.1 (1938) (precedent statute to 18 U.S.C. § 3568). While it is true that appellant may have been required to serve a minimum total of three years and ten days in prison, and while it is entirely possible that he may have remained incarcerated for five years and ten days (Br. 12), he will not have done so under this sentence. He will have done so because he is precluded from gleaning statutory credit from the prior service, and because the trial court felt the offense to which he pleaded—at the time he pleaded—warranted the confinement imposed. That Congress intended to leave a judge free to impose sentence without mandatory consideration of pre-sentence confinement is clear from inclusion of the exception in the statute which singles out offenses requiring a mandatory minimum sentence. 18 U.S.C. § 3568.

II. Appellant's sentence does not infringe his constitutional rights.

Double Jeopardy

Appellant urges that his present sentence constitutes double jeopardy within the meaning of the Fifth Amendment because it subjects him to "a second punishment" (Br. 26). Without suggesting that he was immune from further proceedings following the reversal of his case, he argues that he could not validly be given more time than would bring his total confinement after arrest to a maxi-

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[2] While appellant states he was given credit on his earlier sentences for pre-sentence incarceration (Br. 19, n.8), this was not warranted as to the assault conviction, though it was required under the then concurrent sentence for robbery. 22 D.C.C. 2901.

mum of three years. He cites no authority supporting this application of the double jeopardy clause. His proffered decisions involving resentence or correction of duplicative sentence on a single conviction do not apply to the facts of his case.

The short answer to appellant's contention under this head is that, even assuming he was "twice sentenced" for the same crime, he has not been subjected to double jeopardy.

> "The erroneous imposition of two sentences for a single offense of which the accused has been convicted or as to which he has pleaded guilty, does not constitute double jeopardy." *Holiday* v. *Johnson*, 313 U.S. 342, 349 (1941).

And see *United States* v. *Ball*, 163 U.S. 662, 669 (1896) ("The prohibition [of the Fifth Amendment] is not against being twice punished, but against being twice put in jeopardy. . .").

This aside, however, it is axiomatic that where a defendant in a criminal case procures a judgment against him to be set aside, he can be convicted again upon the same or another indictment based on his same actions. *United States* v. *Tateo*, 377 U.S. 463 (1964); *Stroud* v. *United States*, 251 U.S. 15 (1919); *United States* v. *Ball*, *supra*. See *Ex parte Lange*, 85 U.S. 163, 173 (1873). The double jeopardy clause does not preclude the case from a retrial. It may be prosecuted again as if nothing had gone before: by procuring reversal, the defendant waives his right to plead in bar his former jeopardy. *Ball* v. *United States*, *supra*; *Bayless* v. *United States*, 147 F.2d 169, 170 (8th Cir. 1945). See *Trono* v. *United States*, 199 U.S. 251, 253 (1905). His second sentence may be increased upon a second conviction. *Stroud* v. *United States*, *supra*.

If a convict attacks but one conviction supporting concurrent or consecutive sentences imposed on two separate convictions, he does not affect the jeopardy which has attached in the undisturbed conviction. He receives

credit against that sentence for his time served. *Ekberg* v. *United States*, 167 F.2d 380 (1st Cir. 1948); *Youst* v. *United States*, 151 F.2d 666 (5th Cir. 1945); *Bayless* v. *United States*, 147 F.2d 171 (8th Cir. 1945).

In cases where the convict attacks only the legality of his sentence, he is seen not to disturb the jeopardy which attaches to his conviction, and cannot be retried therefor. *United States* v. *Sabella*, 272 F.2d 206 (2d Cir. 1959); *Williams* v. *United States*, 238 F.2d 215, 220 (5th Cir. 1957), *cert. denied*, 352 U.S. 1024 (1957). Upon successful attack of the sentence alone, however, he may be resentenced to a period exceeding the original sentence imposed without offense to double jeopardy. *Murphy* v. *Massachusetts*, 177 U.S. 155 (1900); *King* v. *United States; Supra; DeBenque* v. *United States*, 66 App. D.C. 36, 85 F.2d 202, *cert. denied*, 298 U.S. 681 (1936). See *Hayes* v. *United States*, 102 U.S. App. D.C. 1, 249 F.2d 516 (1957). Upon successful attack on the underlying conviction, however, both conviction and sentence are waived: the time served under the prior void judgment "might justify a claim for leniency insofar as his present legal sentence is concerned" but has nothing to do with a claim to relief sought under a guise of double jeopardy. *United States ex rel. Jones* v. *Nash*, 264 F.2d 610, 613 (8th Cir.) *cert. denied*, 360 U.S. 930 (1959); cf. *Barrow* v. *United States*, 54 App. D.C. 128, 295 Fed. 949 (1924).

It is clear in the instant case that appellant's successful attack on his conviction for assault with intent to rob waived jeopardy attaching thereto not only for sentence but for conviction as well.[3] *Stroud* v. *United States, supra; United States ex rel. Jones* v. *Nash, supra; Barrow* v. *United States, supra.* Thus credit for the time served could not be compelled under color of avoiding double jeopardy, even if the double jeopardy clause applied.

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[3] If by some forensic sleight of hand appellant were deemed to waive jeopardy as to the first conviction but not as to the first sentence, relief would still be denied. The limit of jeopardy for sentencing purposes would remain, probably as the maximum under the original sentence (12 years), which will not be exceeded before appellant will be free from his present sentence.

Due Process

It warrants emphasis that appellant's due process claim is neither that his incarceration resulted in trial prejudice, *e.g.*, *Taylor* v. *United States*, 99 U.S. App. D.C. 183, 238 F.2d 259 (1956), nor that either conviction is tainted by individiously discriminatory lack of a fundamental element of fair trial and review, such as counsel, transcript, fees, or witness subpoenas. He argues simply that a rich defendant would have been free during the period between arrest and final conviction, and that his poverty alone precluded his freedom and that the overall result is offensive to due process. This position must assume that constitutional infirmity infected appellant's confinement even as he endured it prior to the sentence now he serves.[4] His restraint did not offend the Constitution at that time, and it has not become offensive as a result of imposition of sentence in the instant case.

The question of pre-trial—and preaffirmance—incarceration in a criminal case pits the individual's right to liberty against considerations of necessity that an accused give adequate assurance he will return to court. *Stack* v. *Boyle*, 342 U.S. 1, 5 (1951). As in other constitutional areas, the right assured is not absolute, and does not reach every inconvenience, discomfort or disparity. For instance, a poor litigant has a right to counsel, yet he has no right to counsel of his choice, or to the experienced trial advocate his rich counterpart may command. See *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 259 F.2d 787, *cert. denied*, 358 U.S. 850 (1958). Where the Constitution itself expressly recognizes an individual right as a relative one, the public's right to the benefits of its system of justice and practicalities of criminal law administration are balanced against the individual's situa-

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[4] Analytically, once bail is set, and court processes are availed to a prisoner to adjust the amount, requirements of due process are met. The question then becomes one of reasonableness of the bail, which is evaluated on the basis of the individual incarcerate. *Stack* v. *Boyle, supra.*

tion in arriving at a just—and acceptable—result. *James* v. *United States*, 104 U.S. App. D.C. 263, 261 F.2d 381 (1958) (speedy trial); see *Carbo* v. *United States*, 82 S.Ct. 662 (1962) (bail); *Beavers* v. *Haubert*, 198 U.S. 77, 87 (1905) (speedy trial). And, of course, the litigant is at pains to secure his own rights, where procedures are available to him for that purpose. See *Stack* v. *Boyle*, *supra*. The constitutional stricture against excessive bail recognizes society's right to demand some assurance the accused will return to court. United States Constitution Amendment VIII; *Bandy* v. *United States*, 81 S.Ct. 197 (1960). Appellant suggests no authority or reason requiring a fugitive and confessed perpetrator of four crimes of violence to be released without any such assurance pending conclusion of proceedings against him. No rich man would have such a right.

Pre-trial confinement was visited upon appellant for three months, from arrest on September 15, 1962, until conviction on December 19, when he was convicted for the first of four robberies. His detention during this period was not based on the grocery store assault alone, but on a total $9000 bond required by four crimes. (See footnote 1, *supra*.) At no time did appellant move for a reduction of this bond (or seek release on personal recognizance), or move to accelerate the proceedings (or urge dismissal for want of a speedy trial), whereby to relieve an oppressive situation. He has not only failed to preserve the point for appellate review. He has not even raised it in the first instance, and the record stands without proof or proffer of that poverty, or that poverty was the reason he remained in jail.

The complexion of appellant's detention changes significantly after December 19, for thereafter he was held pursuant to a conviction for robbery in Criminal Case No. 834-62, as well as the pendency of his other cases.

Appellant did not apply for bond pending either sentencing or appeal. Of course, even a rich man in appel-

lant's position[5] might well have elected to begin service of his sentence just as appellant did on February 27, 1963. A litigant has no constitutional right to bail pending appeal. *Christoffel* v. *United States*, 89 U.S. App. D.C. 341, 196 F.2d 560 (1951). As the record in the earlier case shows, not until January 1963 did he even seek bond pending appeal. Certainly at no time prior thereto would this Court have been free to override *sua sponte* his election to start service of his sentence.

Appellant's motion to this Court for bail pending appeal fully set out his poverty. The decision of this Court in view of this full picture—and after hearing on the merits of the appeal—cannot so lightly be cast as contributing to a violation of due process.

It is submitted that no violation of due process—or even denial of the right to reasonable bond—has been shown to have occurred prior to sentence or thereafter. The burden of proof is on appellant. *United States ex rel. von Cseh* v. *Fay*, 313 F.2d 620 (2d Cir. 1963). This is not the situation where a plea to the original charge after reversal drew the maximum penalty for that offense without credit for time spent securing a new trial. Appellant's decision to plead to the lesser charge and forego prosecution on the valid indictments—on which he might again receive credit—certainly precludes any due process argument. This is not to suggest, by any means, that appellant is to be shorn of all advantage and credit for his time in jail. His rights to adequate and fair relief in his situation are generously protected by the discretion statutorily assured the trial court in the area of sentencing.

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[5] Appellant may well have been confident of conviction, and known the time he served would needs be credited on a robbery sentence, credit that did not depend on proof of inability to make bond. It does not seem unreasonable—in the absence of proof to the contrary—to suggest appellant had $300 but felt it better deployed in aid of his wife and two children.

Cruel and Unusual Punishment

The claim that the sentence resulted in a cruel and unusual punishment is frivolous. Compare *Smith* v. *United States*, 273 F.2d 462 (10th Cir. 1959), *cert. denied*, 363 U.S. 846 (1960) (sustaining a total of 52 years confinement for a 51-year-old first offender on a fourteen-count conviction); *United States* v. *Jakalski*, 267 F.2d 609 (7th Cir. 1959), *cert. denied*, 362 U.S. 936 (1960) (199 years for robbery). See footnote 6, *infra*. Had appellant gone to trial on the indictment in lieu of which the information was filed charging attempt to commit robbery, and had the government proved the facts confessed by his plea, he would have been vulnerable to sentence of fifteen years.

III. Review of appellant's sentence is limited to ascertainment of whether the sentence is allowable under the statute.

(September 17 Tr 1-20; September 25 Tr 1-18.)

The applicable law in this circuit has recently been succinctly stated:

> "It is clear beyond peradventure that this court had and has no control over a sentence which comports with the applicable statute, 'even though it be a death sentence.' Nor may we reduce or modify a sentence or require a trial judge to do so." *Jones* v. *United States*, 117 U.S. App. D.C. 169, 327 F.2d 867 (1963) (and authorities therein cited).

It cannot be overridden by implication, as appellant would require.

Appellant does not suggest that the trial judge here did not exercise discretion, *i.e.*, *Yates* v. *United States*, 356 U.S. 363 (1958), nor that improper motives hindered exercise of discretion, *i.e.*, *United States* v. *Wiley*, 278 F.2d 500, 504 (7th Cir. 1960). Thus this sentence should be affirmed. See *Epperson* v. *Anderson*, 117 U.S. App. D.C. 122, 123, 326 F.2d 665, 666 (1963).

Assuming *arguendo* exercise of sentencing discretion was reviewable, appellant cannot carry his point by the bald assertion that no reason could be given which would justify failure to credit appellant's earlier confinement on his present sentence[6] (Br. 47-48). Appellant himself acknowledged at sentencing that some twenty-two months before he was properly classified as "a menace to society" (September 25 Tr. 5). It would seem that the only question left was the sufficiency of his confinement, or whether more time was warranted (as the judge found). A sentencing judge has a wide range of materials he may consider in determining punishment. See *Williams* v. *New York*, 337 U.S. 241 (1949).[7] In any case, where the sentencing judge has already approved a reduction to a lesser charge which obviously contemplates the prior serv-

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[6] Happily, appellant has abandoned here the argument made below that he was a mere follower in the robbery attempt (his fourth within six weeks' time) and that the fact the robbery was ultimately unsuccessful mitigates culpability for its attempt (September 25 Tr. 5). Thus to enlist (in avoidance of punishment) the courage of the grocer and his wife who faced drawn guns with but cleaver and knife steel, routing their predators at risk of being murdered themselves, borders on mockery of the right of allocution. This, together with the beneficial effects of his time already served and his ability to go to work if put on probation was all appellant mustered to support award of a lenient sentence.

[7] As in *Williams*, the Court might properly have relied on previously confessed though unconvicted offenses in determining punishment. See Note 1, this brief, *supra*. The Judge may have further evaluated appellant's decided and affirmative embarkation on a robbery career that only was checked when appellant knowingly left his fingerprints at the scene of a frustrated robbery attempt, and became a fugitive. That appellant may have remained incarcerate because of poverty pending disposition of his case may have been somewhat offset in the Judge's mind by the fact that poverty was a knowing choice of appellant, as demonstrated by his ability to work at lawful employ before his crime spree, during his stay in North Carolina, and the offer of a former employer made just prior to sentence. See *Short* v. *United States*, *supra*. Of course, appellant's chosen felonious profession had yielded a share in excess of $600.00 only a month before, in the run of its brief course. See note 5, this Brief, *supra*. And by any standards, the robbery attempt was as full in its satisfaction of the activity contemplated by the statute as one could imagine.

ice; where his remarks following sentence indicate he has fully evaluated the matter (September 25 Tr. 15-16); where the same judge has participated in two complete trials of the accused, and has been treated to a full probation report whose conclusions even appellant has accepted; and where the penalty for the identical actions has been reduced, more must be shown to support a charge of abused discretion than a bald statement to that effect. See *United States* v. *McWilliams*, 82 U.S. App. D.C. 259, 261, 163 F.2d 695, 697 (1947).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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REPLY BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,940

Willie L. Short, Jr., Appellant,

v.

United States of America, Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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TABLE OF CITATIONS

*/ Cases principally relied on.

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I. APPELLEE HAS FAILED TO SHOW THAT THE IMPRISONMENT IMPOSED UPON APPELLANT IS WITHIN THE LIMITS PRESCRIBED BY LAW

Appellant was convicted only of attempted robbery.[1/] D.C. Code § 22-2902 expressly limits the imprisonment of a person convicted of attempted robbery to "not more than three years . . . ." The Court below has nevertheless required appellant to be imprisoned for over three to five years.

Nowhere does appellee attempt to explain how the imprisonment imposed upon appellant may be squared with the express and unambiguous language of D.C. Code § 22-2902.

The plain and inescapable fact is that the Court below unlawfully did "indirectly what it could not have done directly . . . it . . . ordered the defendant's incarceration for a period longer than was allowed by statute." Brief for Appellee, pp. 9-10 n. 7, Harry C.

1/ Appellee's brief is replete with gratuitous suggestions that appellant is guilty of three robberies and two assaults with intent to rob. As appellee admitted at oral argument, the Court below convicted appellant only of attempted robbery. All other charges have been dropped. Only in appellee's brief has appellant been tried and convicted of any other crime.

Williams v. United States, D.C. Cir. No. 18,399, April 23, 1964.

Appellee's reliance on 18 U.S.C. § 3568 proceeds in complete disregard of the provisions as well as the history of that section.

Section 3568 does not, as appellee seems to think, permit federal Judges to treat presentencing imprisonment as though it never happened. This Court has long rejected thinking so much "in the vein of The Mikado" as this. King v. United States, 69 U.S. App. D.C. 10, 12-13, 98 F.2d 291, 293-94 (1938); see Holloway v. United States, D.C. Cir. No. 18,017, Nov. 5, 1964; Hayes v. United States, 102 U.S. App. D.C. 1, 3-4, 249 F.2d 516, 518-19 (1957), cert. denied, 356 U.S. 914 (1958).[2/]

To the contrary, Section 3568 is a mandate that forbids federal jailers to treat as a nullity imprisonment that has in fact happened. See appellant's opening

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2/ See also United States v. Sabella, 272 F.2d 206, 208-09 (2d Cir. 1959); Ekberg v. United States, 167 F.2d 380, 388 (1st Cir. 1948); Youst v. United States, 151 F.2d 666, 667-68 (5th Cir. 1945); McDonald v. Moinet, 139 F.2d 939, 941 (6th Cir.), cert. denied, 322 U.S. 730 (1944); Lewis v. Commonwealth, 329 Mass. 445, 108 N.E.2d 922 (1952).

brief, pp. 48-54. Moreover, the legislative history of the 1960 amendment to Section 3568 clearly evidences a Congressional expectation that the federal Courts would grant credits for presentencing imprisonment wherever possible.

And even should this Court disagree with every other of appellant's arguments, it should nevertheless hold that appellant is entitled to the credits that Section 3568 requires federal jailers to give for presentencing imprisonment. Because appellant was convicted of a felony, D.C. Code § 24-203(a) requires that any imprisonment imposed include a minimum term. Notwithstanding the contrary administrative interpretation, such a minimum term is plainly a "minimum mandatory sentence" within the meaning of Section 3568. See appellant's opening brief, p. 53 & n. 24.[3/]

3/ At oral argument appellee asserted that by reason of D.C. Code § 24-201c, D.C. Code § 24-203(a) cannot be read as requiring a "minimum mandatory sentence." But D.C. Code § 24-201c simply empowers the Parole Board to apply for and the Court to grant "a reduction of . . . minimum sentence." (Emphasis supplied.) The section does not permit elimination of a minimum sentence. The Parole Board obviously may not even apply for a reduction until part of the minimum has been served.

II. APPELLANT HAS NOT WAIVED HIS RIGHT TO INVOKE THE PROTECTION OF THE DOUBLE JEOPARDY CLAUSE

Appellant does not dispute that, at least in some circumstances, an accused who secures reversal of a conviction may thereafter again be tried for the same or a lesser offense. See United States v. Tateo, 377 U.S. 463 (1964); Green v. United States, 355 U.S. 184 (1957). But, "This is by no means to say that punishment inflicted under a void sentence may be ignored in determining whether a resentence subjects the prisoner to more punishment than the legal maximum for his offense." King v. United States, supra at 14 n. 3, 98 F.2d at 295 n. 3. Nor is it to say that an accused may be "required to serve again the time he has been imprisoned by reason of the invalid sentence." Hayes v. United States, supra at 4, 249 F.2d at 519.

The reason that retrial may sometimes follow reversal is not, as appellee claims, that "the defendant waives his right to plead in bar his former jeopardy." (Brief for Appellee, p. 10.) As the Supreme Court has ruled:

> "'Waiver' is a vague term used for a great variety of purposes, good and

bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. . . . . When a man has been convicted . . . and given a long term of imprisonment it is wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy . . . in order to secure a reversal of an erroneous conviction . . . . In short, he has no meaningful choice. And as Mr. Justice Holmes observed, with regard to this same matter in Kepner v. United States, 195 U.S. 100, at 135: 'Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights to important as to be saved by an express clause in the Constitution of the United States.'" Green v. United States, supra at 191-92. (Emphasis supplied, except for citation.)

"While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the . . . principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction . . . ." United States v. Tateo, supra at 466.

Once "the societal interest in punishing one whose guilt is clear after he has obtained such a [fair] trial" has been served, the justification for permitting retrial has been fully satisfied. Wholly different considerations come into play when the retrial has been completed, a fairly obtained conviction adjudged, and the time to resentence arrives. At this stage of the procedure, it is the societal interest, and the Court's duty to implement that interest, that persons convicted of crime suffer punishment only to the extent expressly allowed by statute. E.g., In re Bonner, 151 U.S. 242 (1894); King v. United States, supra. Any punishment inflicted in excess of the statutory maximum violates the double jeopardy clause. E.g., In re Bradley, 318 U.S. 50 (1943), Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873); see Hayes v. United States, supra.

The difference between the rule that permits retrials and that which forbids double punishment is no better illustrated than by one of the cases upon which appellee relies, Bayless v. United States. Bayless was convicted in 1938 on separate charges of bank robbery and motor vehicle theft. On these charges he was sentenced to concurrent terms of twenty and five years, respectively.

In September 1942 he attacked his convictions on habeas corpus. Because in 1938 he had been deprived of his right to counsel, in May 1943 he was issued a writ discharging him from confinement under the 1938 convictions.

In July 1943 he was retried and again convicted on both indictments. On appeal he asserted that the double jeopardy clause protected him against retrial. The Eighth Circuit upheld the retrial of the bank robbery charge. 147 F.2d 169, 170, rehearing granted and conviction reversed on other grounds, 150 F.2d 236 (8th Cir. 1945).

But, because Bayless had already been sentenced to and had suffered the maximum imprisonment the statutes permitted on the motor vehicle charge, the Court held, 147 F.2d 171, that the double jeopardy clause forbade retrial of that charge:

> "[T]he attempt of the government to subject the appellant to trial upon this indictment for the identical offense for which he had suffered the full punishment prescribed in the sentence rendered thereon was contrary to the Fifth Amendment to the constitution and constituted double jeopardy, forbidden by the amendment, and . . . he

was entitled to be discharged from any further proceedings under this indictment.

* * * *

"So far as we have been able to discover, this appeal presents the only instance in our history where a man who has been sentenced and has served the maximum imprisonment for a crime has then been brought back and in the face of that record retried on the same charge and sentenced to serve the maximum over again. We do not sanction the precedent.

"On the record before us we hold that the judgment and sentence appealed from undertake to punish the appellant twice for the same offense, contrary to the Fifth Amendment, and are erroneous." Id. at 172.4/

4/ Relying on quotations seized from their contexts in Holiday v. Johnston, 313 U.S. 342 (1941), and United States v. Ball, 163 U.S. 162 (1896), appellee argues that the double jeopardy clause bars only double trials and not double punishments for a single offense. Of course, this contention is wholly at odds with In re Bradley, 318 U.S. 50 (1943), which was decided two years after Holiday and forty-seven years after Ball. The language quoted from Holiday referred to and rejected Holiday's argument that once he pleaded guilty to the first count of a two-count bank robbery indictment, his jeopardy was complete and he could not then be required to plead to a second count charging an aggravated form of the same offense. See Brief for Petitioner, p. 47, Holiday v. Johnston, supra. The language appellee has taken from Ball merely points out that a person acquitted of murder may not be tried a second time for the same murder simply because he was not, and could not have been, punished following the acquittal.

III. THE RECORD ESTABLISHES CONCLUSIVELY THAT ONLY APPELLANT'S POVERTY PREVENTED HIS RELEASE ON BAIL DURING HIS PRESENTENCING IMPRISONMENT

Appellee's arguments that appellant has proved neither that he is a pauper nor that his poverty caused his presentencing imprisonment were not made below, as they should have been if valid. Those arguments were not made below for a very practical reason -- the facts of record establish (1) that appellant is so poor that at no time could he have afforded any bail other than recognizance; and (2) that appellant at no time qualified for release on his own recognizance.

Appellant executed no less than ten affidavits of poverty in the proceedings that predated his sentencing below.[5/] In six of these affidavits appellant swore that

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5/ Appellant was named defendant in four indictments below, D. D.C. Cr. Nos. 834-62, 835-62, 836-62, and 837-62. On October 9, 1962, he executed separate affidavits in each case in support of his applications to proceed without prepayment of costs. On November 14 and again on November 28, 1962, he executed an affidavit captioned in all four cases in support of motions for issuance of subpoena. On December 27, 1962, he executed in No. 835-62 an affidavit in support of a third motion for issuance of a subpoena. On January 28, 1963, he executed in No. 836-62 a fourth such affidavit. On December 27, 1962, appellant executed in No. 834-62 an affidavit in support of his application to appeal in forma pauperis. On January 28, 1963, he executed a second appeal affidavit, this one in No. 835-62.

he was without assets.[6] On January 30, 1964, appellant moved in the Court below for release on his own recognizance, asserting that he was so impoverished that he could afford no monetary bond.[7] The Court below denied the relief requested, setting bond at $3,500. In February 1964, appellant renewed his motion in this Court, stating that his assets totaled $14.[8]

Appellee even now does not challenge any of the pauper's affidavits appellant has filed. Neither last February nor now has appellee disputed appellant's claim that in February he had only $14. Never until filing its brief on this appeal did appellee suggest in any way that appellant is not a pauper. Even now not a single shred of evidence -- in or out of the record --

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6/ These six affidavits include the four executed on October 9, 1962, and the two appeal affidavits. The four subpoena affidavits do not expressly deny the possession of assets, but contain the general statement, "I do not have sufficient means and am actually unable to pay the fees of the witness or witnesses."

7/ See Memorandum of Points and Authorities In Support of Motion For Bail Pending Appeal and Other Relief, p. 3, filed Jan. 30, 1962, in United States v. Short, D. D.C. Cr. Nos. 834-62 and 835-62.

8/ See Memorandum Regarding Pending Motions, pp. 1-2 & n. *, filed Feb. 20, 1964, in Short v. United States, D.C. Cir. Nos. 17,689 and 17,691.

is cited in support of appellee's claim that appellant is not a pauper. The only matter even bordering on the factual that appellee offers in support of its belated assertion is its speculation that appellant has proceeds from three robberies of which he has never been convicted and with which he is no longer charged.

Appellee's claim that appellant's poverty did not cause his presentencing imprisonment is on no firmer footing. Even though the record demonstrates so clearly that at no time could appellant have afforded any monetary bond, nowhere does appellee suggest that appellant was at any time a fit subject for release on his own recognizance. Nowhere does appellee suggest that it erred in its earlier position -- upheld by the Court below and apparently[9] by this Court -- that "appellant would flee if released without conventional surety."[10] To the contrary, appellee

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9/ On February 10, 1964, appellant moved in this Court for immediate issuance of mandate or release in his own recognizance. On February 17, appellee opposed appellant's motion, and itself moved for an extension of time in which to petition for rehearing. This Court granted appellee's motion for an extension, but never acted formally on appellant's motion.

10/ See Opposition to Motion For Immediate Issuance of Mandate or Reduction of Bail Pending Completion of Proceedings, p. 2, filed on Feb. 17, 1964, in Short v. United States, D.C. Cir. Nos. 17,689 and 17,691.

both abides by and relies on its prior position on this appeal as well.[11] (Brief for Appellee, p. 14.) On this record, the only possible conclusion is that at no time could appellant have obtained release on his own recognizance -- the only bail that he could have afforded.[12]

11/ Had appellee raised its present factual contentions in timely fashion below, appellant would have been able to prove that after this Court's remand reversing his original convictions, appellant was referred to the D.C. Bail Project, which refused to recommend appellant for release on his own recognizance. See Appendix A to this Brief. Such evidence would have assumed even greater significance in light of the apparent refusal of the Court below to grant release on recognizance to one of appellant's co-defendants, David Jones, even though the Bail Project recently presented a motion for such release. See the docket entries in the Court below in Cr. Nos. 834-62 and 835-62.

12/ Appellee apparently argues that appellant has no rights cognizable under the due process clause that were not satisfied by the right to reasonable bail provided by the Eighth Amendment. Of course, appellant had no absolute right to release on his own recognizance, if the Courts determined, as they did, that a monetary bond was needed to insure appellant's presence in the jurisdiction when needed. This may mean, as it did in appellant's case, that the Courts may sometimes discriminate between the impoverished and others in granting release from imprisonment between arrest and sentencing. But any such discrimination is consistent with the quest for equal justice for the poor required by the due process clause only if the Courts, wherever possible, treat imprisonment for want of bail for what it is in fact -- penal incarceration of the nature imposed as punishment upon conviction of felony. This is all the more necessary in appellant's case, where most of his imprisonment in fact occurred at the reformatory, and where virtually all of his imprisonment was served pursuant to an invalid sentence imposed upon a conviction based on the same facts as was appellant's guilty plea.

IV. THERE WAS AN ADEQUATE REMEDY AT THE TIME OF SENTENCING AND THERE IS AN ADEQUATE REMEDY NOW FOR THE REALIZATION OF APPELLANT'S RIGHTS

At oral argument Judge Wright inquired of counsel whether, at the time of sentencing, there was a means by which the Court below could have imposed a sentence that recognizes the rights that appellant here claims.

Appellant claimed below and asserts here three rights: (1) the right to have a minimum sentence imposed that would make him eligible for consideration for parole as quickly as possible; (2) the right to have a maximum sentence imposed that would have in no event permitted his imprisonment for more than three years; and (3) the right to be released "as on parole" as provided by 18 U.S.C. § 4164 no later than would have been the case had he in fact been imprisoned on a maximum sentence of one to three years ever since the day his imprisonment in fact began.

The first right -- to become eligible for parole as quickly as possible -- could have been satisfied in substance by the imposition of a minimum sentence of one day. This was the relief appellant requested below.

The second right -- not to be imprisoned for more than three years -- could have been satisfied by the imposition of any maximum sentence up to and including 355 days.

The third right -- to have secured appellant's right to release under the good behavior statute -- could have been implemented in a number of ways. First, the Court below could have sentenced appellant to a term calculated to expire on the date a one to three year imprisonment beginning on September 15, 1962, would have expired with maximum good conduct credits and appellant's heroism credits. Because appellant had in fact been an exemplary prisoner, this was the relief asked below. Alternatively, the Court could have imposed a split sentence under 18 U.S.C. § 3651. This relief was suggested in appellant's opening brief, at p. 24 n. 12. A third possibility would have been for the Court below first to impose a sentence with a one day minimum and some allowable maximum that would have resulted in a mandatory release date later than the one claimed by appellant, and then effectuate appellant's rights by thereafter entertaining a motion to reduce sentence under Federal Rule of Criminal Procedure 35, or a motion to correct sentence under 28 U.S.C. § 2255, once it was established that appellant had in fact remained on good behavior through the required date.

Were this Court to agree with appellant's position, remedies such as these would equally be available on remand. Because the date on which appellant claims a right to be released has passed, recognition of appellant's rights would be even simpler if on remand it appeared that appellant had

in fact remained on good behavior through December 7, 1963. In such event, the Court below could achieve appellant's remaining rights by placing him on probation for the remaining period of supervision contemplated by 18 U.S.C. § 4164.[13/]

13/ Appellee apparently argues that appellant, in pleading guilty to attempted robbery in exchange for the agreement of appellee to drop all other pending charges, impliedly waived his rights to object to the imposition of imprisonment in excess of one to three years. No agreement to waive the rights asserted below and here could possibly be based on mere implication. Moreover, just before appellant's plea of guilty was accepted below, and a week before appellee kept its part of the bargain by moving to drop the other pending charges, appellant's counsel stated in open Court that appellant was not waiving any rights he might have regarding the effect of his presentencing imprisonment on the power of the Court to impose additional imprisonment on him. The trial Court expressly ruled that appellant was "not waiving anything at all." Government counsel stood mute throughout this exchange. See transcript of proceedings, September 17, 1964, pp. 14-15.

Appellee's claim that Williams v. New York, 337 U.S. 241 (1949), which involved only the question of what strictures the due process clause of the Fourteenth Amendment places upon state judges in determining sentence, may be applied in federal prosecutions is immaterial to this appeal. In D.C. Code § 22-203(b) Congress has provided a method for the enhancement of punishment of recidivists. That section permits extra punishment only of persons "convicted" of other crimes. Therefore, punishment should not be enhanced without proper notice, trial, proof, and conviction. See United States ex rel. Collins v. Claudy, 204 F.2d 624 (3d Cir. 1953), and cases cited there.

Appellee's brief completely misconstrues the nature of appellant's argument based on the proscription of cruel and unusual punishment of the Eighth Amendment. The issue is not an abstract one depending solely on the total length of imprisonment imposed on appellant. The question is whether that imprisonment exceeds the standard of one to three years set by Congress to such an extent that it is cruel and unusual.

CONCLUSION

For the foregoing reasons and for those set forth in his opening brief, appellant submits that the judgment of sentence below should be reversed, and the case remanded with directions to pronounce a new sentence that places appellant in a position equivalent with that which would have obtained had his imprisonment since his arrest been pursuant to the maximum statutory term of imprisonment of one to three years.

Respectfully submitted,

/s/ Harris Weinstein
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(By Appointment of This Court)

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APPENDIX A[14/]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Willie L. Short, Jr., Appellant, v. United States of America, Appellee.	)	No. 18,940

AFFIDAVIT

PAUL K. MURPHY, first being duly sworn, says:

1. I reside at 124 Third Street, S. E., Washington, D. C.

2. I am presently a student at the Georgetown University Law Center.

3. On August 20, 1964, I was employed by the D. C. Bail Project.

4. On August 20, 1964, at the request of Addison M. Bowman, Esquire, I interviewed Willie L. Short, Jr., at the District of Columbia Jail for the

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14/ The original of this affidavit is attached to the original copy of appellant's reply brief filed in this Court.

purpose of determining whether the Bail Project should recommend Mr. Short for release on personal recognizance.

5. The Bail Project did not recommend Mr. Short for release on personal recognizance because Mr. Short did not qualify for such release according to the criteria of the Project.

/s/ Paul K. Murphy

PAUL K. MURPHY

Subscribed and sworn to me
in the City of Washington
in the District of Columbia
this 17th day of December, 1964.

/s/ Andrew J. Ellmer

NOTARY PUBLIC

My commission expires: April 30, 1967